anticipation thereof is immaterial. It is axiomatic that in all stages of litigation, parties may simultaneously attempt resolution and also be preparing for litigation (or further litigation) in the event that the negotiation is unsuccessful. Oracle's position ignores this reality and has no legal basis.

Furthermore, there is no basis to conclude that any documents containing attorney-client communications can be compelled to be disclosed in discovery – regardless of the date of creation.

Moreover, any documents withheld or redacted on these bases will be identified in the forthcoming privilege log.

Relevance Objections

OFCCP stands by its objection that "materials reflecting OFCCP's internal deliberations and processes in its investigation are not relevant because they will not show, one way or the other, whether Oracle violated its equal opportunity obligations, including through engaging in systemic compensation and hiring discrimination."

This case concerns claims against Oracle for its discrimination in hiring and compensation. Resolving these claims requires no inquiry into the internal steps or deliberations OFCCP undertook in performing its investigation. The law is well settled that a government agency's pre-complaint investigation is only a procedural prerequisite to filing suit. OFCCP's complaint, not the compliance review, frames the issues for this litigation. As with EEOC cases, OFCCP's investigation and conciliation efforts do not frame the issues during litigation. As the court held in EEOC v. Keco Indus., Inc., 748 F.2d 1097 (6th Cir. 1984), where, as here, the law intends for an agency to conduct a pre-litigation investigation and informal resolution process, the "the nature and extent of an [agency's] investigation" is not an issue before a court considering a Complaint to enforce the underlying law. Id. at 1100 (citing EEOC v. St. Anne's Hospital, 664 F.2d 128 (7th Cir. 1981). Moreover, OFCCP's compliance-review findings "do not adjudicate rights and liabilities; [they] merely place[] the defendant on notice of the charges against him. If the charge is not meritorious, procedures are available to secure relief, i.e. a *de novo* trial…." Id. (citing EEOC v. E.I. Dupont de Nemours & Co., 373 F. Supp. 1321, 1338 (D. Del. 1974)); see EEOC v. Sterling Jewelers Inc., 801 F.3d 96, 101 (2d Cir. 2015), cert. denied, 137 S. Ct. 47 (2016) ("courts may not review the sufficiency of an investigation—only whether an investigation occurred"). Courts recognize that any other rule would create an unnecessary distraction about the adequacy or efficacy of the agency's investigation, rather than keeping the focus on the actual question to be resolved: whether the employer violated the law. Keco Indus., Inc., 748 F.2d at 1100 (citing Miniature Lamp Works, 526 F. Supp. at 975).

Moreover, Oracle will receive in discovery information regarding OFCCP's investigation and to show that OFCCP engaged in the prerequisites to filing suit. However, Oracle is *not* entitled to discover OFCCP's internal deliberations and processes, which are protected by government privileges and have no bearing on the allegations in this case. Oracle has provided no legal authorities to support its position that it should be permitted to go on a fishing

expedition into wholly irrelevant matters, which appear calculated to harass and unduly burden OFCCP.

Documents beyond Investigative File

OFCCP will be producing non-privileged, relevant documents that are proportional to the needs of the case, and subject to the objections it has asserted. It is required to do nothing more. Accordingly, OFCCP stands by its response that it "will produce all non-privileged documents contained in OFCCP's investigative file for Oracle Redwood Shores (OFCCP Case No.: R00192699)."

Oracle misstates – with no supporting legal authority whatsoever – the discovery requirements imposed upon OFCCP in claiming that OFCCP must do all of the following: (1) search OFCCP's "national office," and all "regional and district offices," and look "throughout the Agency" for anything remotely responsive, including all documents "created, reviewed, or considered" by any "arms of the Agency's national office"; (2) produce "*all responsive documents* beyond those in the investigative file"; (3) all documents "provided to consulting or testifying experts"; (4) "the statistical analyses performed during any part of the compliance review from the SCER to referral" for enforcement; (5) "any document created by the Branch of Expert Analysis or the Branch of Enforcement"; and (6) all documents OFCCP "may have" obtained from any third parties.

First, the discovery Oracle seeks must be proportional to the needs of the case. Asking OFCCP to comb through the files or folders of any and all OFCCP offices throughout the country, and talk to any person who may have any documents potentially responsive, would be time consuming and unduly burdensome. Oracle seeks to burden OFCCP by attempting to send it on a fishing expedition into irrelevant matters. Government agencies cannot function if they are expected to expend valuable resources complying with such baseless discovery requests. OFCCP will not consume limited resources on irrelevant matters to satisfy Oracle's curiosity. If there are specific documents that Oracle believes have not been produced or should be located, please explain which documents you seek,[2] the importance of such documents in resolving the issues, and justify your position that the time and burden on OFCCP to do the exact search you demand would be justified by Oracle's need to obtain them.

Second, as noted above, OFCCP is certainly not producing privileged documents, all of which will be identified in the privilege log. Oracle's requests seek privileged documents and information.

Third, OFCCP will not be producing draft reports or attorney-expert communications, which are protected under Fed. R. Civ. P. 26(b)(4). For any experts employed for trial preparation or in anticipation of litigation – and who are "not expected to be called as a witness

[2] See April 6, 2017 letter from J.R. Riddell to Norman Garcia (Riddell Letter), page 5 ("To the extent OFCCP believes certain documents were improperly omitted or not uncovered by Oracle's efforts, it bears the burden to identify these documents.").

at trial – Oracle is not entitled to discover "facts known or opinions held" by them, as Oracle has requested. Id. Oracle's demands for expert discovery are also premature at this point.

Fourth, OFCCP will not be producing any in-house statistical analyses performed as these documents are protected under the various privileges and are irrelevant, as set forth in OFCCP's objections and noted above. Oracle has provided no legal authorities for its demand that OFCCP produce its internal statistical analyses performed at any time, nor has it made any showing as to why Oracle has any need for OFCCP's statistical analyses, or what bearing they have on this litigation. OFCCP's outside testifying expert witness will do his or her own independent analyses, and OFCCP does not intend to rely on its own analyses during the litigation of this matter. OFCCP will produce any testifying expert's analyses and the data upon which the analyses are based at the appropriate time.

Privilege Log

OFCCP will be producing a privilege log to identify any documents withheld or redacted – and the bases therefore – as soon as possible.

RPD No. 65

OFCCP will not withdraw its objections that the request is "unduly burdensome, duplicative and unnecessary." The "related to" portion of Oracle's request renders the request extremely overbroad and would clearly impose a substantial and undue burden on OFCCP to locate any and all documents that could conceivably "relate to" the fact that OFCCP requested "various records" and Oracle "refused to produce" them. OFCCP will conduct a reasonable search as noted above, but OFCCP will not undertake an unduly burdensome search and production of any possible documents that may "relate to" this allegation. OFCCP will also not guess at which documents OFCCP has in mind or what Oracle considers "relating to" these issues. Furthermore, this request seeks privileged information. Without waiving any objections, OFCCP will be producing documents that Oracle provided to OFCCP previously.

Your letter indicates that this request also seeks documents that reflect "facts regarding OFCCP's decision to not issue a SCN" and "conversations with third parties regarding the requests." Again, OFCCP's internal deliberations and discussions, if any, regarding whether or not to issue a SCN is not at issue in this litigation and is therefore irrelevant. The underlying facts regarding OFCCP's requests and Oracle's refusals to produce will be provided in the non-privileged responsive documents or through witness testimony. Oracle is not entitled to discovery into OFCCP's privileged decisions and conversations, and nor are they relevant.

RPD No. 70

OFCCP will not withdraw its objections that the request is "unduly burdensome, duplicative and unnecessary." The "related to" portion of Oracle's request renders the request extremely overbroad and would clearly impose a substantial and undue burden on OFCCP to locate any and all documents that could conceivably "relate[] to any objections and inquiries

made by Oracle in connection with the conciliation process." This could call for production of any category of documents, including privileged documents and documents that have no bearing on the issues to be litigated in this case. OFCCP will not undertake an unduly burdensome search and production of any possible documents that may "relate to" any objections and inquiries made by Oracle. OFCCP will also not guess at which documents OFCCP has in mind or what Oracle considers "relating to" these issues. Without waiving any objections, OFCCP will be producing documents that Oracle provided to OFCCP previously.

Moreover, Oracle is seeking information wholly irrelevant to the matter before the Court here. As identified above, the nature and content of OFCCP's investigation and the conciliation process is not at issue. Rather, OFCCP must only establish that it undertook an investigation and engaged in conciliation. In interpreting language in Title VII nearly identical to Section 209 of the Executive Order,[3] the Supreme Court held that the obligation to attempt to resolve a violation by "methods of conference, conciliation, and persuasion" requires only that the EEOC "afford the employer a chance to discuss and rectify a specified [violative] practice." Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1653 (2015). The Agency's motives are simply not germane to the analysis. As the Ninth Circuit has recently held in Arizona v. Geo Grp.:

> Although the EEOC, like any party to litigation, may not negotiate in good faith, these concerns were addressed by a unanimous Supreme Court in *Mach Mining*. The Court explained:
>
> > Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief. For a court to assess any of those choices—as Mach Mining urges and many courts have done, is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far.

Arizona ex rel. Horne v. Geo Grp., Inc., 816 F.3d 1189, 1199 (9th Cir. 2016), cert. denied 2017 WL 69195 (U.S. Jan. 9, 2017) (quoting Mach Mining, 135 S. Ct. at 1656). Accordingly, any internal discussion OFCCP had about the conciliation process, and indeed, even the contents of the conciliation process itself are simply not relevant and therefore beyond the scope of discovery. Even assuming *arguendo* any marginal relevance, the discovery is not proportional to the needs of the case.

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[3] Compare 42 U.S.C. § 2000e-5 (the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion") with E.O. 11246 § 209 ("[t]he Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance … by methods of conference, conciliation, mediation, and persuasion…").

Defendant's Interrogatories, Set One

Government Privileges

Please see the above response with regard to OFCCP's assertion of government privileges. In short, Plaintiff is only required to provide a formal invocation of the privileges *to the Court* when those privileges are challenged. See, e.g., El Tequila, 2014 WL 5341766, at *4. OFCCP has properly asserted and objected on the basis of various government privileges and Oracle has made no showing to the contrary.

Contention Interrogatories

OFCCP will not be withdrawing its objections *inter alia* that the contention interrogatories are premature, an abuse of the discovery process, overly broad, unduly burdensome, and seek information – due to Oracle's refusals to produce – that remain solely in Oracle's possession. See legal authorities cited in OFCCP's response and objections. The discovery is not proportional to the needs of the case given Oracle's access to the information, the burden on OFCCP to respond, and the extremely low (assuming any) value of the discovery in resolving whether Oracle violated its equal employment obligations. Fed. R. Civ. P. 26(b)(1).

None of the cases Oracle provided assist its position that OFCCP need withdraw its properly asserted objections. The Sixth Circuit decision is not controlling in this jurisdiction. The other cases are equally unavailing. See Burch-Lucich v. Lucich (inapposite because the issue there was whether contention interrogatories sought information protected under the work product privilege by asking the party to link evidence to elements of the claim); see Hamilton v. Radioshack Corp. (noting that contention interrogatory analyses are "highly fact-specific," and finding a response was owing in *that case* given the "stage of the litigation and in the context of the facts of this case"); see S.E.C. v. Berry, WL 2441706, at * fn 2 (N.D. Cal. June 15, 2011) (referring to U.S. ex rel. O'Connell v. Chapman Univ., a case cited by Oracle, as one of the decisions that "were all highly fact specific and of little help here," in denying the motion to compel responses to contention interrogatories).

Oracle has provided no persuasive reason or any legal authority for its position that OFCCP is barred from asserting its objections simply because it is government agency as opposed to a private party.[4] Oracle bemoans what it calls the "one-way nature of the exchange during the compliance review," and complains, essentially, that OFCCP should not need to conduct discovery because it performed an investigation. There is no case that supports this argument. Further, Oracle, like all contractors, is required to provide "records pertaining to … rates of pay or other terms of compensation …." See 41 C.F.R. § 60-1.12(a). The fact that it

[4] The only case cited by Oracle, EEOC v. Port Auth. Of New York, is not helpful at all. In that case, the litigation was roughly 11 months underway, and the court determined that the Port Authority, at that point, should serve contention interrogatories so that Port Authority could better determine the grounds of EEOC's claim. The comment by the Court during oral argument regarding the "first wave of discovery" is not referenced in the citation above and has no bearing.

provided some records does not prevent OFCCP from seeking facts and information in discovery, like any other litigant.

Privileges

OFCCP has asserted privileges, where applicable, to each interrogatory as required. It will not withdraw its general objections regarding privileges.

Third General Objection

OFCCP will agree to withdraw the general objection regarding documents or information that is "already in the Defendant's knowledge, possession, control, or are equally ore more readily available to the Defendant." That said, one consideration in evaluating the permissible scope of discovery proportionality – and this includes the parties' relative access to relevant information. Fed. R. Civ. P. 26(b)(1). To the extent that Oracle possesses documents or has information that OFCCP does not, OFCCP properly objects. Further, OFCCP will be producing documents that Oracle provided previously.

Limit of Twenty-Five Interrogatories

As set forth in a March 20, 2017 letter to your office, OFCCP stands on its objection that it is not required to respond to interrogatories in excess of 25. OFCCP is "not obligated to provide any additional responses" above and beyond "*the applicable* limit of twenty-five interrogatories contained within the Federal Rules of Civil Procedure." See B &H Foto & Electronics Corp., OALJ Case No. 2016-OFC-00004, at *2 (emphasis added); see also Walker v. Lakewood Condominium Owners Ass,n, 186 F.R.D. 584, 586 (C.D. Cal. 1999) ("Rule 33(a) expressly forbids a party from serving more than 25 interrogatories upon another party "[w]ithout leave of court or written stipulation."). Additionally, Judge Larsen's Pre-Hearing Order specifically states that 29 C.F.R. Part 18 Rules ("Part 18 Rules") apply unless they are inconsistent with the Rules at 41 C.F.R. 60-30. In 2015, the Part 18 Rules were amended to incorporate the 25 interrogatory limit contained in the federal rules. As such, OFCCP will not be responding to interrogatory numbers 26-88 because Oracle failed to obtain leave of court or written stipulation of OFCCP as required.

Oracle's "Interrogatory Responses" Section of Its Letter

Again, OFCCP's investigation and its "intention" – regarding the investigation or this proceeding – are not at issue in this litigation and are therefore irrelevant. Indeed, in many other contexts, courts consistently recognize that the targets of an administrative subpoena may not resist the subpoena by demands for information about the Agency's motivation or allegations that the Agency is simply on a "fishing expedition."[5] For example, in Reich v. Montana Sulphur

[5] See Solis v. Forever 21, Inc., Case No. CV 12-09188 (C.D. Cal., March 7, 2013) (subject of subpoena's allegation that the government was on a "fishing expedition" was of no merit in resisting a subpoena under the Fair Labor Standards Act) (available at

and Chemical Co, the Ninth Circuit upheld a district court's refusal to order discovery into the agency's motivations in the face of a subpoena issued by the Occupational Safety and Health Administration to probe OSHA's reasoning for issuing a subpoena.[6] Also, in In re EEOC, the Fifth Circuit enforced an EEOC subpoena, refusing an employer's request for discovery on an alleged improper motive for opening the investigation.[7] Similarly, the Ninth Circuit refused to permit discovery in the face of a Federal Trade Commission discovery order (akin to a subpoena) where the employer was under investigation and the employer argued that its due process rights were being violated.[8] The court found that discovery into the decision-making process of the FTC was improper, concluding "[w]e will not speculate as to the possible states of the Commissioners' minds during the pending decisional process."[9]

It is entirely unclear from this portion of your letter which interrogatories you claim "provide little to no facts," and also which interrogatories you contend are incomplete because they reference other interrogatory responses or documents. Without a response from you on these issues, it is impossible for OFCCP to respond. Further, as a general matter, courts have held that "incorporation by reference" is permitted, provided that references are "clear and not meant to evade answering." See, e.g., Nguyen v. Bartos Eyeglasses, 2011 WL 4443314, at * 2 (E.D. Cal., September 22, 2011) (citations omitted).

Interrogatory No. 2

OFCCP complied with its discovery obligations in responding. No further response is warranted. This request seeks information that is not relevant to the case – namely how OFCCP conducted is compliance review. Even assuming marginal relevance, it is not proportional as it has no value or importance in the issues to be litigated. Oracle has made no showing as to why it needs this information to defend against discrimination claims. Finally, your letter requests information that is way beyond the scope of the interrogatory as written and seeks to improperly create additional sub-parts to this interrogatory. Oracle had twenty-five interrogatories to propound and it cannot now attempt to issue more interrogatories as follow-up requests.

Interrogatory No. 3

OFCCP will not be providing Oracle with the identities of confidential government informants. See legal authorities above. Oracle cannot articulate any "compelling" reason to demand to know which of its employees has spoken to OFCCP. Any attempt by Oracle to

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https://www.dol.gov/opa/media/press/whd/WHD20130447-fs.pdf, last accessed February 1, 2017).

[6] Reich v. Montana Sulphur & Chem. Co., 32 F.3d 440, 449 (9th Cir. 1994) (finding no error where the district court enforced an Occupational Safety and Health Administration subpoena without permitting discovery by the employer, citing *Dresser*).

[7] In re EEOC, 709 F.2d 392, 400 (5th Cir. 1983).

[8] United States v. Litton Indus., Inc., 462 F.2d 14 (9th Cir. 1972).

[9] Id. at 18.

discover this information would constitute unlawful interference and intimidation. 41 C.F.R. § 60-1.32. I want to caution your client, Oracle, that it cannot and should not be attempting to determine this information through its current or former employees. Your client's continued demand for this information is very concerning.

Interrogatory No. 4

OFCCP complied with its discovery obligations in responding. No further response is warranted. Moreover, this request seeks information that is not relevant to the case – namely how OFCCP conducted is compliance review. Even assuming marginal relevance, it is not proportional as it has no value or importance in the issues to be litigated. Oracle has made no showing as to why it needs this information to defend against discrimination claims. As stated above, OFCCP is not obligated to, and will not provide discovery regarding any experts employed for trial preparation or in anticipation of litigation – and who are "not expected to be called as a witness at trial."

Interrogatory No. 5

OFCCP complied with its discovery obligations in responding. No further response is warranted. Further, "incorporation by reference" is permitted here, as the references are "clear and not meant to evade answering." See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2. OFCCP not only provides factual responses to the interrogatory but also specifically identifies for Oracle the additional references instead of having to repeat out the same information that is provided in response to Interrogatory No. 2, the NOV and attachment, and the Amended Complaint.

Please provide legal authority for your position that OFCCP must additionally provide, in this response, all of the information you say you be provided at page 10 of your letter: "models it considered, the facts it used or rejected, what the statistical results were of the model…." etc. It appears that Oracle is again attempting to tack on sub-parts to this interrogatory during the meet and confer process.

Interrogatory Nos. 7-8

OFCCP complied with its discovery obligations in responding. No further response is warranted. Further, "incorporation by reference" is permitted here, as the references are "clear and not meant to evade answering." See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2. OFCCP not only provides factual responses to the interrogatory but also specifically identifies for Oracle the additional references instead of having to repeat out the same information that is provided in response to Interrogatory Nos. 2 and 5, the NOV and attachment, and the Amended Complaint. The response is identical for numbers 7-8 and there is no need to reiterate the exact same response for Oracle.

Please provide legal authority for your position that OFCCP must additionally provide, in

this response, all of the information you say should be provided at page 11 of your letter. It appears that Oracle is again attempting to tack on sub-parts to this interrogatory during the meet and confer process.

Interrogatory No. 9

Subject to and without waiving any prior objections, OFCCP supplements its answer as follows.

OFCCP contends that Oracle failed to produce records as requested by OFCCP during the investigation. *See* Amended Complaint, ¶¶ 11-15. To the extent that Oracle is found to have failed to produce records to which OFCCP was entitled, and Oracle did not preserve those records OFCCP would be entitled to an adverse inference against Oracle as to the content of those records. *See* 41 C.F.R. 60-1.12(e) ("[w]here the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor…"). However, as Oracle has not yet provided documents or identified destroyed documents responsive to this interrogatory, OFCCP cannot answer as to whether or not an adverse inference should apply to Oracle with respect to lost documents.

Interrogatory No. 10

OFCCP complied with its discovery obligations in responding. No further response is warranted. Further, "incorporation by reference" is permitted here, as the references are "clear and not meant to evade answering." See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2. OFCCP specifically identifies for Oracle the references instead of having to repeat out the same information that is provided in response to Interrogatory Nos. 2 and 5, the NOV and attachment, and the Amended Complaint.

Please provide legal authority for your position that OFCCP must also provide, in this response, "information OFCCP 'considered,'" in addition to "facts related to the basis" of the same allegation. It appears that Oracle is attempting to invade the work product protection by inquiring into the information OFCCP considered, and then determined were not supportive of the allegation. OFCCP will not provide privileged information. Oracle has failed to show why it needs to ascertain what information OFCCP "considered."

Interrogatory No. 11

OFCCP complied with its discovery obligations in responding. No further response is warranted. Oracle is capable of readily obtaining the names of the employees without OFCCP compiling the information for it. OFCCP identified the specific document to which Oracle can find this information. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Interrogatory No. 12

OFCCP complied with its discovery obligations in responding. No further response is warranted. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Interrogatory No. 13

OFCCP complied with its discovery obligations in responding. No further response is warranted. Oracle is capable of readily obtaining the names of the employees without OFCCP compiling the information for it. OFCCP identified the specific document to which Oracle can find this information. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Interrogatory No. 14

OFCCP complied with its discovery obligations in responding. No further response is warranted. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Interrogatory No. 15

OFCCP complied with its discovery obligations in responding. No further response is warranted. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Again, Oracle appears to be seeking to improperly add sub-parts to this interrogatory by demanding to know various additional pieces of information – such as "what steps" OFCCP took, etc.

Interrogatory No. 16

OFCCP complied with its discovery obligations in responding. No further response is warranted. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Interrogatory Nos. 17-19

OFCCP complied with its discovery obligations in responding. No further response is warranted. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

As stated above, OFCCP will not be producing any statistical analyses performed as these documents are protected under the various privileges and are irrelevant, as set forth in OFCCP's objections. Oracle has provided no legal authorities for its demand that OFCCP provide information on its statistical analyses performed at any time, nor has it made any showing as to why Oracle has any need for OFCCP's statistical analyses, or what bearing they have on this litigation. OFCCP's outside testifying expert witness will do his or her own independent analyses, and OFCCP does not intend to rely on its own analyses during the litigation of this matter. OFCCP will produce the testifying expert's analyses and the data upon which the analyses are based at the appropriate time.

Interrogatory No. 20

OFCCP complied with its discovery obligations in responding. No further response is warranted. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Interrogatory Nos. 22-23

OFCCP complied with its discovery obligations in responding. No further response is warranted. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Interrogatory No. 24

OFCCP complied with its discovery obligations in responding. No further response is warranted. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

Once again, Oracle appears to be seeking information protected by the work product doctrine, by asking OFCCP to state facts "considered" and, separately, the factual basis for the same allegation. OFCCP will not divulge privileged information. There is also no need to ascertain what information OFCCP "considered" in "conjunction" with its findings.

Interrogatory No. 25

OFCCP complied with its discovery obligations in responding. No further response is warranted. Oracle is capable of readily obtaining the names of the employees without OFCCP compiling the information for it. OFCCP identified the specific document to which Oracle can find this information. See, e.g., Bartos Eyeglasses, 2011 WL 4443314, at * 2.

If you wish to further discuss, please let me know.

Sincerely,

/s/Natalie Nardecchia
Natalie Nardecchia
Trial Attorney

orrick

May 8, 2017

Via E-Mail

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Re: *OFCCP v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006

Dear Ms. Nardecchia:

I write in response to your April 18, 2017 letter regarding OFCCP's responses and objections to Oracle's first set of interrogatories and first set of requests for production of documents. With respect to interrogatories, other than agreeing to withdraw OFCCP's general objection regarding documents or information already in Oracle's knowledge, possession, control, or that are equally or more readily available to Oracle, your letter makes clear that OFCCP is unwilling to compromise in response to the detailed meet and confer letter Oracle sent on March 27, 2017. Accordingly, the parties have reached an impasse. We intend to file a motion to compel.

Regarding OFCCP's responses to Oracle's document request, OFCCP's agreement to search for and produce non-privileged documents from its "investigative file" does not meet its obligation to search for and provide all relevant documents in its custody, possession or control. Additionally, for the reasons Oracle already has explained in its letter dated March 27, 2017, OFCCP's objections to Oracle's requests are meritless.

Nevertheless, the scope of OFCCP's production may influence the nature and scope of any motion to compel by Oracle, as will an assessment of OFCCP's privilege log. Accordingly, Oracle requests (yet again) that OFCCP produce the documents it has agreed to produce immediately, and by no later than May 12, 2017. Oracle also requests that OFCCP produce a privilege log. If OFCCP does not produce the documents it has agreed to produce, as well as a privilege log, Oracle will move to compel with respect to documents as well.

Very truly yours,

Erin Connell

Erin M. Connell

cc: Gary R. Siniscalco

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June 6, 2017

Via E-Mail

Laura C. Bremer
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San Francisco, California 94103.

Dear Ms. Bremer:

I write to further meet and confer with respect to OFCCP's objections and answers to Oracle's Request for Production, Set One, in light of OFCCP's recent production. I also note several deficiencies in OFCCP's privilege log. Although our review of OFCCP's document production is continuing, and may reveal further specific areas that warrant additional follow up, I am raising the larger concerns addressed in this letter now.

I. OFCCP HAS UNREASONABLY REFUSED TO PROVIDE ALL RESPONSIVE DOCUMENTS

A. OFCCP Has Unreasonably Refused to Provide Documents Beyond the Investigative File

OFCCP improperly limits the production to the documents in its investigative file. The applicable regulations, rules, and Supreme Court precedent entitle Oracle to request documents in OFCCP's possession, custody, and control. 41 C.F.R. § 60-30.10; *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 165 (1980) (citing Fed. R. Civ. 34) ("[A] party is

required to produce requested documents if they are within his 'possession, custody or control.'").

OFCCP has complained that it is not required to "comb" through its files. Whatever that means, the rules mentioned above require the production of responsive documents after reasonable inquiry that are in OFCCP's possession, custody, or control. And this does not appear to have been done. OFCCP has expressly limited its production to what is contained in its investigative file without apparent inquiry as to whether responsive documents are possessed by others, but not contained in the investigative file. We further note that OFCCP's production appears to consist almost entirely of documents produced to OFCCP by Oracle (as well some, but apparently not all, correspondence between OFCCP and Oracle). Although Oracle cannot be expected to know what other responsive documents exist outside of OFCCP's investigative file, we do note that OFCCP does not appear to have produced internal OFCCP correspondence about this matter. Moreover, as a further example, it must be that OFCCP communicated with various witnesses, but there do not appear to be any such emails or documents, not even on OFCCP's privilege log.

II. OFCCP'S INVOCATION OF THE PROPORTIONALITY RULE IS IMPROPER

OFCCP has invoked the rule of proportionality in limiting its production. *See* Fed. R. Civ. P. 26(b)(1). That rule was implemented to avoid discovery abuse. The rule is not intended to allow a party to generically refuse to produce discovery. Adv. Comm. Notes, 2015 Amendment to Rule 26 ("[T]he change does not place on the party seeking discovery the burden of addressing all proportionality considerations. [¶] Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.")

Additionally, none of the factors that courts consider as to whether discovery is proportionate to the needs of the case weigh in favor of OFCCP. Fed. R. Civ. P. 26(b)(1) (identifying "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

If OFCCP remains steadfast in its refusal to provide documents pursuant to the rule of proportionality, at the least, OFCCP should identify the steps taken and not taken in connection with its document production and identify the documents being withheld. While Oracle anticipates moving to compel if any document is withheld under such a rule, the ALJ should be allowed the opportunity to rule on this assertion with knowledge of the efforts that OFCCP considers proportional and the documents withheld. Moreover, Oracle should be afforded the opportunity to argue whether OFCCP's definition of proportional is commensurate with a case in which OFCCP is likely to seek to recover millions and millions of dollars from Oracle.

III. OFCCP'S PURPORTED ASSERTION OF PRIVILEGE

A. OFCCP's Privilege Assertions Should Be Modified

In its document response, OFCCP first cites to specific objections, such as the deliberative process privilege and the attorney-client privilege. It then recites additional privileges described as those "provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law." *See, e.g.*, OFCCP Resp. to RFP No. 1. These are improper. *See, e.g., Fischer v. Forrest*, 2017 U.S. Dist. LEXIS 28102 (S.D.N.Y. Feb. 28, 2017); *Liguria Foods Inc. v. Griffith Labs, Inc.*, 2017 U.S. Dist. LEXIS 35370 (N.D. Iowa March 13, 2017). Given that OFCCP cites to specific privileges, the additional broadly described, catchall privileges indicate that the privilege(s) falling into these catchalls are different than the specific privileges asserted. Yet, without some specification of what the particular privileges are, Oracle is not able to assess the merits of any such privilege, rendering the assertions improper. Alternatively, these catchall provisions are redundant of the specific privileges asserted. In either case, these blanket, unspecified, privileges should be removed.

B. OFCCP's Privilege Log Is Deficient

OFCCP's privilege log is not drafted such that it allows Oracle or the ALJ to evaluate documents for privilege. The party asserting that documents are protected by a privilege must give sufficient identification of the material withheld so that opposing counsel can determine whether the privilege ought to apply. *See Solis v. Seafood Peddler of San Rafael, Inc.*, No. 12-cv-0116 PJH (NC), 2012 WL 12547592, at *2 (N.D. Cal. Oct. 16, 2012) (holding that "a party must . . . describe the nature of the documents, communications, or things not produced or disclosed–and

do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." (citing Fed. R. Civ. P. 26(b)(5)(A))).

First, the log does not identify privileges as it pertains to individual documents. Rather, Bates numbers, dates, and privileges, are all combined such that it is not clear whether the dates listed apply to all or only some of the documents or whether the privileges apply to one or more documents. For example, one entry in the log is entitled "OFCCP log regarding the compliance review." Under date, it states "many." Under privilege asserted, it states all of them. Oracle is entitled to know for each of the documents referenced which specific privilege applies and what date applies. This is what the law requires. *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (privilege log must include parties involved, the nature of the document, and the date the document was generated, prepared, or dated.); *Solis*, 2012 WL 12547592, at *1-3 (noting the Secretary of Labor's repeated failures to provide an adequate privilege log); *Muttitt v. Dep't of State*, No. 10-202 (BAH), 2013 WL 781709, at *19 (D.D.C. Mar. 4, 2013) (deliberative process privilege involves evaluating whether communications were from subordinates to supervisor or vice versa.). Since certain of the privileges asserted have different exceptions, Oracle must be in a position to determine what documents are protected by what privileges.

In other places, there are a number of documents identified in groups, but a greater number of dates. Thus, the entry "OFCCP notes of interview with confidential witnesses." There are seven Bates stamp ranges—one of almost two hundred pages—but 14 dates and one "und" indicated. Oracle is entitled to know what documents correspond to what date range and to what privilege.

Similarly, in the description of "preliminary statistical analyses," OFCCP lists 20 sets of Bates ranges. However, there are only seven date ranges listed for that set of documents, and at least one document is noted by OFCCP to be "undated." This information does not appropriately identify the dates and privileges that correspond to the documents. *See* Oracle's Request for Production of Documents, p. 3 ¶ 14 ("Please identify each DOCUMENT for which the privilege is claimed and give the following information [names, dates, statement of basis for privilege as well as] a description of the DOCUMENT sufficient for the Court to rule on the applicability and appropriateness of the claimed privilege."). Please provide a supplemental privilege log that complies with these requirements.

And with regard to the statistics, as OFCCP knows, Oracle believes that it is entitled to the statistical analysis, and facts related thereto, which are revealed in OFCCP's Amended Complaint and notice of violation. However, the privilege log does not appear to identify that analysis. If it does, given the way that OFCCP has grouped various documents, Oracle cannot determine which entry pertains to the statistical analysis set forth in the Amended Complaint. Oracle is entitled to know which documents(s) pertain to that statistical analysis and which privileges are being asserted as to that statistical analysis.

Although the log identifies some people, it does not identify any person's position. Nor does the log identify all authors and recipients by name, instead using a generic "SOL" or "DOL" or "OFCCP" shorthand frequently. This too is insufficient. A privilege log must include the names of the authors and recipients, the nature of the document, and the date that the document was generated, prepared, or dated. *In re Grand Jury Investigation*, 974 F.2d at 1071; *see also Solis*, 2012 WL 12547592, at *1-3 (noting the Secretary of Labor's repeated failures to provide an adequate privilege log, including the Secretary's failure to provide the names of persons listed as "various employees"); *Muttitt*, 2013 WL 781709, at *19 (deliberative process privilege involves evaluating whether communications were from subordinates to supervisor or vice versa.).

Finally, OFCCP asserts a "PII" privilege. Oracle is entitled to know the basis for the privilege. In addition, Oracle is entitled to know what is being withheld on the basis of that privilege.

C. OFCCP Has Waived Governmental Privileges by Failing to Provide an Affidavit From the Head of the Agency

Even assuming that the privileges that OFCCP asserts were to apply substantively, OFCCP has not properly invoked these privileges for the reasons stated in my March 27, 2017, letter. E. Connell Letter to L. Bremer (Mar. 27, 2017) ("The government must formally invoke any government privilege regardless of the privilege.") citing *United States v. O'Neill*, 619 F.2d 222, 225-26 (3d Cir. 1980); *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 388 (5th Cir. 1970), *cert. denied sub nom, Aldridge v. Carr*; 400 U.S. 1000 (1971); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 543 (D.C. Cir. 1977); *Garber v. United States*, 73 F.R.D. 364, 364-65 (D.D.C.1976); *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988); *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 44 (N.D.N.Y.1991); *Martin v. Albany Bus. Journal, Inc.*, 780 F. Supp. 927, 932 (N.D.N.Y. 1992).

OFCCP cites *Perez v. El Tequila LLC*, 2014 WL 5341766, at *4 (N.D. Okla. 2014), for the proposition that it need not provide an affidavit from the head of the agency. *Perez* is not good authority. As OFCCP keeps reminding Oracle, decisions outside of the Ninth and D.C. Circuits are not controlling. Moreover, the decision contains no reasoning or citation for the proposition that an affidavit from another person is acceptable. Thus, OFCCP has waived the governmental privileges, including the deliberative process privilege and the investigative files privilege, because it has failed to provide an affidavit by "the head of the department which has control over the matter, after actual personal consideration by that officer." *Kerr v. U.S. Dist. Ct. for N.D. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976).

D. OFCCP's Invocation of the Deliberative Process Privilege Is Overbroad

OFCCP's invocation of the deliberative process privilege is overbroad. First, OFCCP cannot invoke the deliberative process privilege to withhold factual materials. *EPA v. Mink*, 410 U.S. 73, 91 (1973); *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998). For example, in its April 18, 2017, letter, OFCCP stated that it "will not be producing any in-house statistical analyses." Letter from N. Nardecchia to E. Connell at 5 (Apr. 18, 2017). However, OFCCP's statistical analyses—specifically those referenced in the Amended Complaint and notice of violation—would not be protected under the deliberative process privilege because such analyses are not deliberative. As OFCCP is aware, the deliberative process privilege only applies to opinion or recommendatory portions of documents, not factual information. *Mink*, 410 U.S. at 91.

Moreover, once OFCCP incorporated those statistical analyses in its notice of violation, Amended Complaint, and responses to interrogatories, the analyses were no longer deliberative; rather, OFCCP has adopted those analyses as agency decision. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (holding that when a recommendation is "adopted, the reasoning becomes that of the agency"). Similarly, even if the privilege does apply, the privilege has been waived by revealing the results of the statistical analyses. *See Banner Health v. Sebelius*, 2013 WL 11241368, at *5 (D.D.C. July 30, 2013) ("public release of document waives deliberative process privilege with respect to the document and information specifically released"). Moreover, Oracle has a particular need for the information here. *See In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) (qualified privileges are subject to balancing of "the public interest in

nondisclosure . . . against the need of a particular litigant for access to the privileged information"). The analysis forms the basis of each and every one of OFCCP's discrimination claims.

E. OFCCP's Invocation of the Investigative Files Privilege is Uncertain and Vague

OFCCP also makes reference to an "investigative files" privilege. Such a privilege is not well recognized. *Perez v. Guardian Roofing LLC*, No. 3:15-cv-05623-RJB, 2016 WL 1408027, at *3 (W.D. Wash. Apr. 11, 2016) ("[A]uthority for DOL's invocation of the 'investigative files privilege' is less than clear. Neither the 2nd Circuit nor the 9th Circuit cases that DOL relies upon makes any direct reference to such a privilege."). Therefore, Oracle wishes to know the legal basis for that privilege.

Second, Oracle is entitled to know what documents are being withheld pursuant to that privilege that is not covered by the deliberative process privilege. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (rejecting "conclusory assertions of privilege" by the government); *Solis*, 2012 WL 12547592, at *1-3. Oracle notes that each time the privilege log reflects that the investigative files privilege applie the deliberative process privilege is also asserted. Oracle is entitled to know the unique category of information and documents covered by the investigative files privilege that is not covered by the deliberative process privilege.

F. OFCCP's Outright Withholding of Documents Instead of Redaction Is Improper

As mentioned previously, OFCCP's privilege log does not adequately explain what documents are being withheld and on what grounds. *See Solis*, 2012 WL 12547592, at *1-3. More specifically, many of OFCCP's privileges do not justify withholding documents. For example, to the extent that any documents are being withheld entirely on the grounds of the informant's privilege or personal identifiable information, this is improper. Rather, even assuming the identity of the informant may be privileged, contents of communications are not. *Roviaro v. United States*, 353 U.S. 53, 60 (1957) ("[W]here the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged."); *United States v. Spires*, 3 F.3d 1234, 1238 (9th Cir. 1993) ("[T]he government has

a limited privilege to withhold an informant's identity."). Additionally, such information can also be easily produced for attorneys' eyes only, and Oracle would be willing to amend the protective order to incorporate such a provision. *See Hefferman v. City of Chicago*, 286 F.R.D. 332, 336 (N.D. Ill. 2012) (permitting discovery relevant to confidential informant under agreement that information is for attorneys' eyes only). Similarly, any documents being withheld on the grounds that they contain personally identifiable information can be redacted. Thus, OFCCP should reevaluate its objections based on informant's privilege and PII, and withdraw its objections to the extent that any specific documents are being withheld on the grounds of the informant's privilege or on the grounds that the document contains personally identifiable information.

IV. OFCCP SHOULD WITHDRAW ITS RELEVANCE OBJECTIONS

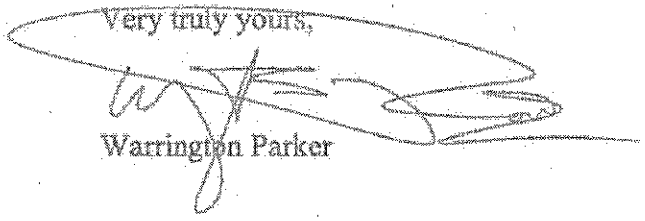
OFCCP's objections to Oracle's requests for documents on relevance grounds are disingenuous. The test for relevancy is "[a] tendency to make a fact more or less probable" or if "the fact is of consequence in determining the action." Fed. R. Evid. 401. Here, every one of Oracle's requests for documents is tied to the underlying compliance audit, or the allegations in the notice of violation, the show cause notice, or the Amended Complaint. If these requests are irrelevant, then so is the corresponding allegation by the OFCCP. Oracle requests that OFCCP withdraw its relevance objections.

Finally, of particular concern is OFCCP's objection that "materials reflecting OFCCP's internal deliberations and processes in its investigation are not relevant because they will not show, one way or the other, whether Oracle violated its equal opportunity obligations . . . ." Letter from N. Nardecchia to E. Connell at 3 (Apr. 18, 2017). By asserting such an objection, it's not clear whether OFCCP is withholding documents on the basis of the deliberative process privilege, on the basis of relevancy, or both. Moreover, it's not clear that documents withheld as irrelevant because they are claimed to be protected by the deliberative process privilege appear on the privilege log. Please confirm that OFCCP is not withholding documents on relevancy grounds and that all documents withheld on the deliberative process privilege appear on the privilege log.

Please let us know by June 12 if OFCCP will be withdrawing its objections, producing documents in accordance with this letter and the authorities cited herein, and/or producing an

amended privilege log. Alternatively, if a meet and confer telephone call would be useful, are happy to schedule one. Please let us know when you are available.

Very truly yours,



Warrington Parker

June 12, 2017

Via E-Mail

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Dear Ms. Bremer:

I write to follow up on my meet and confer letter dated June 6, 2017. As detailed in that letter, OFCCP has taken an overly expansive and improper view of the privileges on which it relies.

I write to emphasize that OFCCP has redacted documents that it should not have, specifically its interview summaries. *See, e.g.*, DOL000000670-674. Several documents appear to be redacted on the grounds of confidentiality. DOL000000673 (interview summaries labeled "Confidential Employee Questions (Shauna stayed)"). However, now that the ALJ has entered a protective order regarding confidential information, there is no basis to redact confidential information. Rather, the proper process would be to stamp these documents as confidential and produce them in unredacted form. Protective Order ¶ 5 (May 26, 2017) (discussing designation of protected material).

OFCCP has also redacted certain documents citing the government informant's privilege. *See, e.g.*, DOL000000709. As stated in my previous letter, OFCCP has waived its right to assert such a privilege. Letter from W. Parker to L. Bremer at 5-6 (June 6, 2017). Additionally, the rationale for keeping information secret under the government informant's privilege is so that the employer does not know the identity of the individual providing information to the government. *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957). However, OFCCP has redacted several documents pursuant to the government informant's privilege that indicate that an Oracle representative was present during the alleged informant's exchange of information with the government. Accordingly, no informant's privilege would apply. *See id.* ("[O]nce the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable."). Furthermore, even if an informant's privilege did apply

to some of the redacted documents, Oracle has already indicated that it is willing to amend the protective order to include a provision that certain information is for attorneys' eyes only. Letter from W. Parker to L. Bremer at 8 (June 6, 2017).

Please produce the interview summaries in unredacted form. While this letter addresses OFCCP's redactions of interview summaries, OFCCP's position raises serious concerns beyond merely these summaries, which we will address in due course, once OFCCP provides an appropriate privilege log, as requested in my prior letter.

Very truly yours,

Warrington Parker